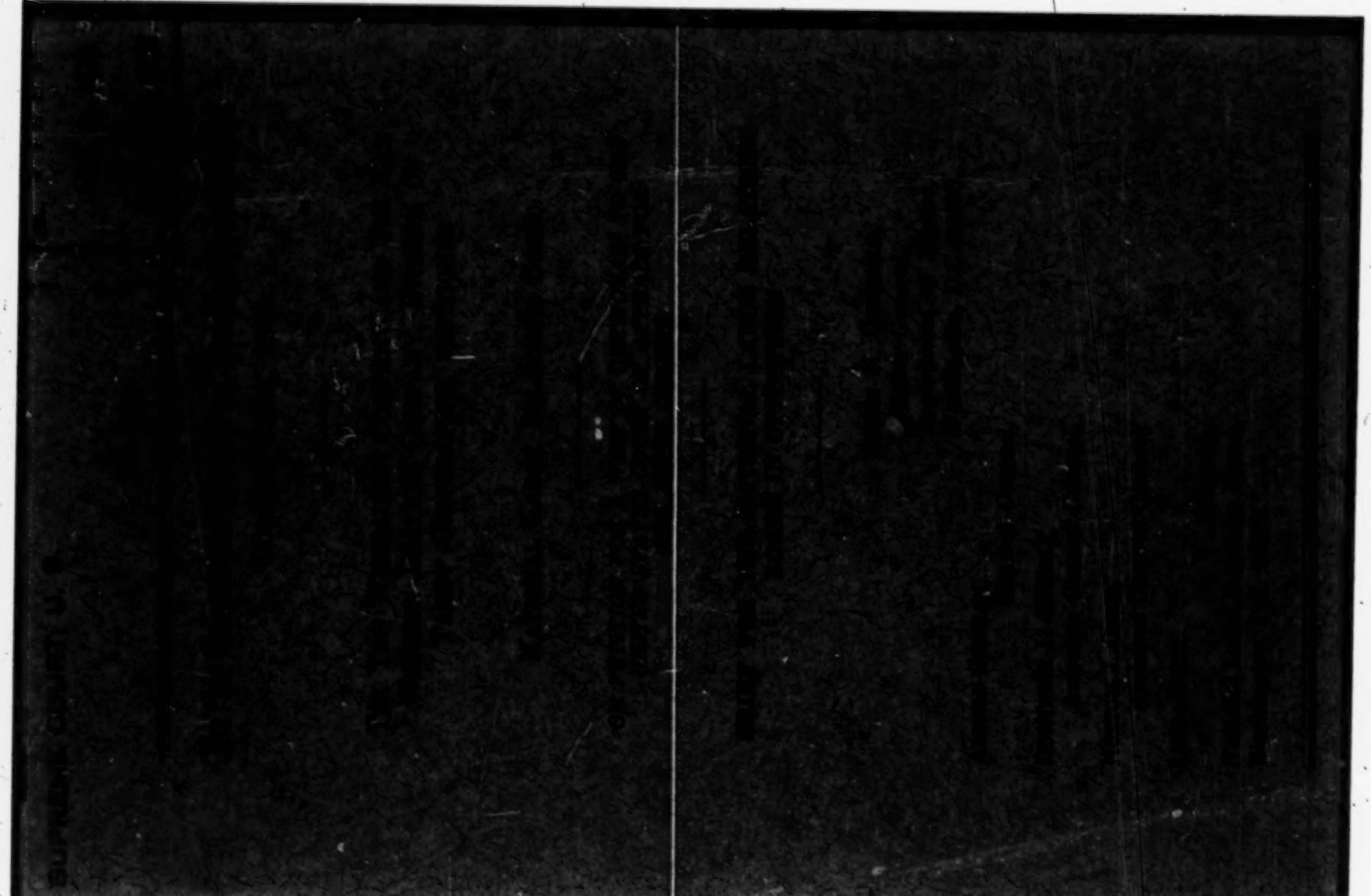

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1288

TEX TAN WELHAUSEN COMPANY AND TEX TAN WESTERN LEATHER COMPANY, DIVISION OF TANDY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 419 F. 2d 1265. The Board's decision and order (Pet. App. A12-A171) are reported at 172 NLRB No. 93.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1969, and a petition for rehearing

was denied on January 12, 1970 (Pet. 2). The petition for a writ of certiorari was filed on March 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act by manifesting overall bad faith in its negotiations with the Union representative of its employees, by refusing to bargain in good faith concerning piecework standards and grievance procedures, and by other conduct.

2. Whether the Board's order remedying the unlawful refusal to bargain is reasonable and proper.

3. Whether the Board properly concluded that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate to their former positions employees who had engaged in an unfair labor practice strike, and by denying vacation benefits to the employees who participated in the strike.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), in addition to Section 8(d) (see Pet. 4), are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board's Findings of Fact

In March 1959, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, was certified by the Board as the representative of the Company's production and maintenance employees. On May 10, 1963, after unfair labor practice proceedings, the Company and the Union entered into their first collective bargaining agreement, for a two-year term (Pet. App. A18). At the Union's request, negotiations for a new contract began in April 1965 (Pet. App. A19).

1. *The negotiations prior to the strike*

Negotiations proceeded for seven months before a strike was called (*infra*, p. 12), during which time the parties held nine formal bargaining sessions without reaching an agreement on anything except one minor point—that employees transferred from one de-

partment to another for the convenience of the Company would not lose their seniority (Pet. App. A71-A72). During these negotiations, the Company "refused to incorporate into a contract matters which were, or which it claimed were, the actual practice, including the Union's right to timestudy a job on which there was a grievance, the Union's right to file grievances on the establishment of standards, and a prohibition against retiming by reason of high earnings alone," while "[a]t the same time it insisted that the contract provide that the employees surrender their statutory right to bargain collectively about piecerates, subcontracting, plant closing or moving, and other matters" (Pet. App. A126). The Company refused to discuss economic matters until the Union made substantial concessions on non-economic matters, but at the same time uttered "subtle threats" to move its operation to Puerto Rico because of financial considerations (Pet. App. A123-A124). It engaged in such delaying and dilatory tactics as using negotiators without authority to commit the Company (Pet. App. A129-A130), insisting on written proposals, and reading undisputed provisions of the contract and lengthy extracts from law review articles during the bargaining sessions (Pet. App. A128-A129). The Company also used unreasonable and shifting arguments to avoid reaching any agreement on such subjects as arbitration, overtime, ventilation, and incorporation in the contract of the Company's own language regarding the retiming of job standards (Pet. App. A132-A135). And it refused to give the Union's timestudy engineer sufficient data to study existing jobs (Pet. App. A93-A94).

The bargaining over piecework standards and grievances procedures illustrates the Company's bad faith in the negotiations:

Under Article III of the prior contract, wages were determined by quantity of production under the Company's "Standard Hour System." [1]. The Company, by engineering stop-watch studies, unilaterally established both the standard and classification rates for particular jobs (Pet. App. A25-A27). During the negotiations, the Union sought to obtain a contract clause which would assure that the standards were fairly set and provide a basis for judging the fairness of the standard if a grievance should arise. Thus, at the third bargaining session, the Union proposed a clause which provided that "with the proper application of incentive effort employees will be able to achieve a minimum of 30 percent above the time-study standard * * *" (Pet. App. A41-A42; R. 2730).

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[1] For a given job, a "standard" is established, which is the number of decimal hours required to produce 100 units by a normal operator working at a normal rate of speed under normal working conditions. A classification rate is also given to each job, for example, $1.31 per hour. Thus, if the standard for a particular job is 2.00 hours, the average employee, working at a normal rate of speed under normal working conditions, should produce 100 units in exactly 2 hours. If, however, he completes 100 units in only 1.5 hours, he would achieve 133 percent of "standard" (2 ÷ 1.5) and, therefore, would earn $1.75 per hour ($1.31 x 133). On the other hand, if he took 3 hours to produce 100 units, he would be producing at only 66 percent of standard (2 ÷ 3) and would only be entitled to $.76 per hour, subject, however, to the federal minimum wage floor (Pet. App. A28; R. 2725-2730.) "R." references, it should be noted, are to the joint appendix printed by the parties for use in the court below.

Union negotiator Shapiro explained that such a clause would prohibit a timestudy engineer from requiring employees to work at incentive to achieve standard (Pet. App. A41; R. 259-262), and would indicate to the employees that they are "expected and provided with the opportunity to earn above [standard]" (R. 350, 345-351). Company chief negotiator Weiss responded that the Union's proposal would provoke grievances (R. 346-347), and added (R. 351):

> Your language doesn't fit the system at all. The system is that a normal man working at a normal speed achieves one hundred percent. You say he has got to achieve one hundred and thirty percent.

Shapiro replied (*ibid.*):

> No, I do not say that. I say with proper application of incentive effort.

Weiss then said this language was "getting into something too vague and indefinite to be practical * * *" (R. 351). Shapiro suggested, instead, that the parties incorporate language from the Company's Information Bulletin into the contract,[2] but Weiss declined (R. 351).

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[2] The Company issued to its employees a booklet entitled "Information Bulletin on Tex-Tan's Standard Hour Plan for Production Workers," which explained the system as follows (R. 2725-2729):

> This unit of work is known as the Standard Hour and represents the standard amount of *Effective Effort* which is reasonable to expect from a worker during *One Hour* by a *Normal Operator* working at a *Normal Rate of*

At a later bargaining conference, the Union proposed language on production standards, which was copied in its entirety from the Company's bulletin (note 2, *supra*) (Pet. App. A44):

> Section 10. An operator working at normal speed is rated one hundred percent (100%). One hundred percent (100%) productivity is attained without special effort if the operator is experienced on the operation and is applying himself normally.

Weiss summarily rejected the new proposal, saying it was the same as the other proposal with changed percentages (Pet. App. A44; R. 1172). When Shapiro remarked that the proposal was new, taken completely from the Company's bulletin, Weiss replied that language appropriate for a bulletin was not suitable for a contract (Pet. App. A44; R. 1172-1174).

Speed under *Normal Working Conditions*. This includes an allowance for *Fatigue* and *Personal Needs*.

* * * * *

An operator working at normal speed is rated 100%.

* * * * *

100% Productivity is attained without special effort if the operator is experienced on the operation and is applying himself normally.

* * * * *

For extra effort or Productivity above 100%, a paid premium is earned.

* * * * *

All time standards are set for the particular method used at the time the time study was made and will not be changed unless the method, procedure, layout, or material is changed.

Also at the third bargaining session, the Union proposed the following revision of Article III of the prior contract, designed to limit the Company's right arbitrarily to retime jobs (Pet. App. A33; R. 2730):

> The Company shall have the right to re-time any job on which a substantial change has been made. Any such retiming and the standard resulting therefrom shall reflect a change in earnings only to the extent of the actual change in the job content. Employees to be time studied shall be advised in advance that the study is to be taken.

It also proposed the following (R. 2730-2731):

> The Company agrees that no job may be re-timed for reason of high earnings alone.

When Company representatives expressed concern that the word "substantial" in the proposal might cause disputes as to whether retiming was justified, Union negotiator Shapiro agreed to drop the word "substantial" (Pet. App. A. 34; R. 228-229). Company representatives then objected that the requirement that a new standard reflect only the change actually made would result in a grievance "every time" as to the extent of the change and that the matter was too complicated to be spelled out in a contract (Pet. App. A34; R. 243-247). Company negotiator Weiss also objected to the provision prohibiting retiming for high earnings, contending that it would prevent correction of standards based on mistakes revealed by the fact that earnings turned out to be far out of line (Pet. App. A34; R. 360). When Shapiro agreed to add the language "This does not preclude the right of the Company to retime a job in which

an error has been made in the original study," Weiss replied that the proposal would sow the seed for grievances (Pet. App. 34-35; R. 360-362).[3]

On July 28, 1965, when the Company finally presented a complete contract proposal, it contained a provision on production standards which was the same as that set forth in the Company's Information Bulletin, except for the prefatory phrase: "Without in any way limiting the Company's authority set forth herein and purely by way of explanation" (Pet. App. A. 35-36; R. 2728-2729). Shapiro asked what the prefatory clause meant—whether it meant that the Company still reserved the right to restudy a job even though there might have been a method change. Weiss cryptically replied, "It means exactly what it says" (Pet. App. A36-A38; R. 934-935).

The Union's effort to obtain a contract provision respecting piecework grievances received the same treatment. Thus, under the old contract the Union did not have the right to grieve over the establishment of piecework standards (Pet. App. A31-A32; R. 2710-

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[3] On another occasion, Company negotiators insisted that jobs never were retimed by reason of high earnings alone. Shapiro said that in that event there should be no objection to so providing in the contract, and asked whether the Company would be in violation of the old contract if it did retime a job because of higher earnings (Pet. App. A39; R. 360-366, 468-513). Weiss said that the proposed clause would be an implied admission that it had happened. Shapiro then proposed that the provision read, "Just as in the past our policy will continue to be that we will not retime a job and change standards on the basis of high earnings alone." Weiss replied that the Union was trying to wreck the Company's piecework system (Pet. App. A38; R. 946-949).

2711). Several such grievances had been processed, however, and the Company early in the negotiations justified its rejection of the Union's various proposals relating to the wage system by claiming that the employees could grieve if they considered standards unfair (Pet. App. A32; R. 332, 616, 883-888). Accordingly, in its contract proposal submitted on October 18, 1965, the Union attempted to revise the grievance procedure to include specifically (R. 2747-2748): "The establishment of * * * any piece-work rate established by the Company." The Company objected, stating that the old contract was not intended to permit the processing of grievances as to the establishment of piecework standards, but only as to mistakes in their application. Weiss added that granting the Union the right to grieve over the establishment of standards sounded "like the Union is going to insist on being involved in the setting of every standard" (Pet. App. A32; R. 1181-1182). Shapiro acknowledged that the Company had the right to set a standard initially without consulting the Union, but inquired whether, under the previous contract, the Union did not have the right to grieve over the establishment of a standard if the Union felt the standard was "not satisfactory." Weiss declined to advance an opinion. He then agreed "to try to draft something * * *," but stated that he was not promising to submit anything (Pet. App. A32; R. 1183-1185). When an argument arose later about whether the Union could grieve over the establishment of standards, Production Manager Manning interjected that the Union had "exercised the right in the past," and

Shapiro agreed that a dozen grievances over piecework standards had been processed (R. 1213). However, Weiss stated that the Union could grieve only if the Company acted arbitrarily. But, when Shapiro sought to pin down what "arbitrarily" meant, Weiss replied, "We are trying to keep you from wrecking the system" (R. 1214-1217).

The Union also attempted to include in the contract a provision guaranteeing it "the right to time study any job on which there is a dispute" (Pet. App. A45; R. 2730-2731). At the fourth conference, Shapiro noted that the Company had permitted independent time studies in the past and asked if the same procedure would automatically be followed in the future when a grievance arose over piecework. Shapiro added that it had taken three weeks to get an answer in the case of one grievance then pending, and said, "* * * I don't want to go through a lengthy procedure in order to get a time study man." Weiss refused to make any arrangements for the future, stating only that the Company would agree to reasonable requests (Pet. App. A45-A46; R. 315-320). When the issue arose later, Weiss said that the matter was adequately covered by the old contract, because the right to file a grievance implied the right to do anything necessary to process it (R. 356-360). Shapiro relied, "Let's say that in the contract," but Weiss rejoined, "I don't think it is necessary to spell it out any more specifically. The law implies that" (R. 358). The Union pressed its timestudy proposal at several of the remaining pre-strike conferences (R. 513-514, 564-566, 580-581, 691-706, 926-934), but

the Company continued to oppose such a contract provision because the Union had been accorded the right to make timestudies in the past and it might use such a clause to "disrupt and undermine the time study" (R. 928).

2. *The strike and subsequent negotiations*

In mid-October 1965, the Union held a membership meeting to discuss the progress of negotiations (Pet. App. A94; R. 1983-1988). Shapiro advised the employees that the bargaining committee had met and voted to strike because of the Company's refusal to bargain. When employees asked whether they were striking because the Company had not given a wage increase, Shapiro replied, "[N]o, we are striking because the Company has refused to negotiate on wages and all the other items which have been reported to you * * *" (Pet. App. A95; R. 1988-1989). After a discussion about strike benefits, the employees, by a secret vote of 212 to 9, authorized the committee to call a strike (Pet. App. A95; R. 1989-1990).

The Company rejected the Union's proposed contract on October 20, and on November 5 the Union filed charges with the Board alleging, *inter alia*, an unlawful refusal to bargain (Pet. App. A16, n. 2). That same day, 60 to 75 employees, representing each department in the Company, met in the Union's office. Shapiro told them that the Company had continued its refusal to bargain, that the Union had filed unfair labor practice charges, and that the strike was being called because of the Company's unfair labor practices. A motion that the Company be

declared on strike as of midnight November 7, 1965, was carried unanimously (Pet. App. A95-A96; R. 2014-2017).

The strike began on November 8, 1965, and lasted for seven months (Pet. App. A96, A104). During that period, the parties held two formal and five executive bargaining sessions in the presence of a federal mediator; the issue of a wage increase was discussed for the first time, but agreement was not reached on that or any other issue (Pet. App. A96-A104; R. 1285-1287, 1307, 1325-1331, 1857-1865, 1345-1354, 2579-2583, 2031-2039).

On June 3, 1966, the Union notified the Company by telegram that the strike was being terminated, and the striking employees unconditionally offered to return to work (Pet. App. A104; R. 2774-2775). On June 7, however, the Company refused to reinstate most of the striking employees until such time as the Company "need[ed] them" and could "work them into the work force" (Pet. App. A144; R. 1366). Some employees were reinstated but not to their former positions, and were thereafter issued warning notices for low production (Pet. App. A144-A155; R. 2273-2276, 2854-2855, 2860, 2865, 2158-2167, 2838-2840, 2304-2306, 2298-2301, 2242, 2208-2212, 2249-2253, 2262-2271, 2282-2290).

The Company also announced, through Weiss, that it would not pay vacation benefits to the strikers. Weiss said that the terms of the old contract (R. 2703) with respect to vacations were being applied. Under that contract, vacation pay was figured as a percentage of the employee's yearly salary, but there

was a further provision that, if an employee missed 200 hours during the vacation year, he lost half, and if he missed 280 hours, he lost all, of his vacation. Because of absences of more than 280 hours, the Company thus disqualified for both 1965 and 1966, as regards vacation pay, all employees who had remained on strike throughout (Pet. App. A156-A158; R. 1472-1476).

On June 7, the parties held their twelfth formal bargaining session. Shapiro brought up the subject of piecework and asked if the Company "was willing to agree in the contract that the Union has the right to study a job in dispute by sending in its own time-study man" (R. 1376). Weiss said he thought the right to timestudy was implied in the Company's proposed contract, but he was unable to point to a specific section (R. 1383-1384). When Shapiro asked why the contract could not explicitly state that the Union had this right, Weiss responded that additional language was "unnecessary verbiage" (R. 1387-1388). When questioned further, Weiss said that the Company's basic objection was that it did not want to give the Union any contract language which would allow the Union to wreck its standard hour system (R. 1389).

Shapiro then asked if the Union had the right to grieve on the establishment of a piecework standard. Weiss said he did not know and refused to incorporate this subject as a grievance item in the contract, on the ground the Union could use it to undermine

the piecework system (R. 1400-1401). Union negotiator Weldon replied that this and many other unions

> • • • are satisfied with the principle of the incentive system. They are willing to agree to the principles of the incentive system, but they do not wish to give up all contractual safeguards over that incentive system. That is, in effect, surrender all the power over wages to the Company—and this is just exactly what you are seeking: [R. 1401.]

Weldon then asked how the right to grieve over the establishment of a standard would wreck the system. Weiss replied that such a grievance would suspend the established standard (R. 1410-1411). When the Union made clear that the standard would continue in effect even after a grievance as to it was filed (R. 1412-1415), Weiss reverted to his former position that under the proposal the Union could file a grievance over every standard (Pet. App. A105-A106; R. 1414-1416).

Three more formal bargaining sessions were held, but they were equally unproductive (Pet. App. 107-109, A113-A114). At one of these sessions, Shapiro protested that the Company had unilaterally promulgated new work rules and published them in booklets which were being given to returning strikers, and that this had been done without consulting the Union (Pet. App. A127-A128; R. 2922-2947). Company negotiators insisted that the new booklets contained no substantive changes (R. 1501-1510), but Shapiro pointed to numerous differences between the old and new rules (R. 1501-1510; compare R. 2922-2930 with R. 2930-2947).

B. The Decisions Below

On these facts, the Board found that the Company had violated Section 8(a)(5) of the Act by manifesting overall bad faith during the course of the negotiations (Pet. App. A135-A136). The Board found that the Company had further violated Section 8(a)(5) by refusing to bargain in good faith about piecework standards and grievance procedures (Pet. App. A117-A123);[4] by instituting work rule changes without notifying the Union (Pet. App. A127-A128); and by refusing to supply the Union's timestudy man with necessary data (Pet. App. A93-A94). The Board also found that the strike was caused and perpetuated by the Company's unfair labor practices; that the strikers were entitled to reinstatement when the strike was terminated; and that the Company had thus violated Section 8(a)(3) and (1) of the Act when, on June 7, 1966, it refused to reinstate to their former positions most of the employees who had unconditionally offered to return to work (Pet. App. A143-A150). Finally, the Board found that the Company further violated Section 8(a)(3) and (1) by denying vacation benefits to the strikers (Pet. App. A156-A158), and Section 8(a)(1) by issuing warn-

[4] The Company's bad faith was shown by its insistence upon unilateral control over the fixing of piecework rates, while at the same time refusing to negotiate in good faith about a definition as to productivity speed rating on the basis of which production standards would be established, refusing to incorporate the definition agreed to in principle into a written agreement, and insisting that employees be denied the right to file grievances over the establishment of production standards (Pet. App. A118-A123).

ing slips for low production to strikers who were reinstated to jobs not their own (Pet. App. A150-A155).

The Board ordered the Company to cease and desist from insisting, as a condition to entering into an agreement with the Union, "upon a provision depriving the employees of their right to file grievances on the establishment of standards of piecework," and "upon excluding from such agreement any definition or guiding principle as to productivity speed ratings on the basis of which production standards for piecework are to be established"; from "[r]efusing to incorporate into a written contract with the Union its agreement as to productivity speed ratings upon the basis of which production standards for piecework are to be established"; and from "in any other manner insisting, as a condition to entering into an agreement with the Union * * *, upon being given the right to fix the rates of pay of its piecework employees unilaterally" (Pet. App. A166-A167). The Board further ordered the Company to bargain collectively with the Union concerning terms and conditions of employment, "including a definition or guiding principle to govern productivity speed ratings for piecework standards, and embody any understanding reached in a signed agreement" (Pet. App. A168-A169); to furnish the Union with information in its possession necessary for the Union to make original timestudies or to check the Company's timestudies (Pet. App. A169); to offer full reinstatement to strikers affected by the Company's unlawful refusal to reinstate, and make such employees whole for any

loss of earnings suffered by reason of such refusal (Pet. App. A169); to pay each striking employee the 1965 and 1966 vacation pay due to him under the May 10, 1963, contract, disregarding for this purpose his absence from work between November 8, 1965, and June 3, 1966 (the period of the strike) (Pet. App. A169-A170); and to expunge from the Company's records any warnings for low production issued following the strike to employees reinstated to jobs not their own (Pet. App. A170).

The court of appeals sustained the Board's findings and conclusions, as based upon substantial evidence, and enforced its order in full (Pet. App. A1-A11).

ARGUMENT

1. The court below concluded that "there is ample evidence in the record to sustain the Trial Examiner's finding [which was adopted by the Board] that Tex Tan did refuse to bargain in good faith regarding the piecework standards and grievances, and that its overall approach to bargaining was not indicative of a good faith attempt to reach contract terms" (Pet. App. A4). Insofar as the petition seeks to challenge this conclusion, it presents only an evidentiary issue which does not warrant review by this Court. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409-410. Moreover, the facts summarized in the Statement (*supra*, pp. 3-15) show that the Board's findings are amply supported by the record.[5]

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[5] Petitioner's contention that the Board's refusal to bargain finding is vulnerable because it rests, in part, on issues not

2. Nor is there merit to petitioner's contention that the order entered by the Board is beyond its powers because it forces the Company to put matters in the contract which have never been agreed upon. The Board found that the Company unlawfully refused to bargain concerning piecework standards and grievance procedures by insisting upon unilateral control over the fixing of piecework rates, while at the same time refusing to negotiate in good faith about the underlying principle which would govern the Company in establishing production standards, and by insisting that employees be denied the right to file grievances over those standards (see note 4, *supra*). The negative provisions of the Board's order (*supra*, p. 17) do not require the Company to agree to any particular contract provision that had not already been agreed to,[6] but merely to cease and desist from continuing to maintain the particular positions respecting production standards and grievance procedures which, in combination, constituted bad faith bargaining on the subject of piecework rates.

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alleged in the complaint (Pet. 17-18) likewise presents no issue warranting review. As the court below found (Pet. App. A7): "Both parties fully litigated the issue of good faith bargaining [indeed, the record is over 3,000 pages] and assumed that these issues were relevant and proper subjects of inquiry. In such a situation the Company has not been prejudiced by the failure of the complaint to articulate in precise detail each and every example of behavior which indicates that the Company negotiated in bad faith."

[6] The Board found that the Company had agreed in principle with the Union that "[a]n operator working at normal speed is rated 100 percent" (Pet. App. A117-A118).

Nor does the affirmative portion of the Board's order (*supra*, pp. 17-18) require the Company to agree to any particular contract provision. It merely requires the Company to bargain in good faith about terms and conditions of employment, "including a definition or guiding principle to govern productivity speed ratings for piecework standards," and to "embody any understanding reached"—if there be one—"in a signed agreement." The order here is thus totally dissimilar from that invalidated in *H. K. Porter Co.* v. *National Labor Relations Board*, No. 230, 1969 Term, decided March 2, 1970, which specifically required the employer to grant the union a checkoff provision, even though the employer had not agreed to such a provision in collective bargaining. As the court below correctly concluded (Pet. App. A9): "The Board's order does no more than require the Company to bargain in good faith and cease its surreptitious semantic ploys and maneuverings which frustrated any hope of agreement on a contract definition which would be meaningful for purposes of determining whether a specific standard was fair * * *. Contrary to Tex Tan's assertions the order only requires that any agreement reached be incorporated into the contract. The Board did not attempt to dictate what the agreement might be." This is fully consistent with the holding in *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, and the language in Section 8(d) of the Act (Pet. 4) to the effect that the obligation to bargain collectively encompasses "the execution of a written contract in-

corporating any agreement reached if requested by either party."[7]

3. Petitioner's challenge (Pet. 13-14) to the Board's finding that the strike was attributable to the Company's unlawful refusal to bargain presents another evidentiary issue which does not warrant further review. In this regard, the court below found that "there is substantial evidence in the record as a whole that it was Tex Tan's refusal to bargain in good faith which prompted the workers to go out on strike" (Pet. App. A5).

Nor is there merit to petitioner's further contention (Pet. 14-17) that the denial of vacation benefits to the unfair labor practice strikers did not constitute unlawful discrimination against the strikers. As this Court held in *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, the denial of vacation benefits to strikers while paying such benefits to non-strikers is discriminatory and hence violative of the Act, absent a substantial business justification for the action. Here the court of appeals properly concluded that the Company had shown "no valid

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[7] Petitioner's contention (Pet. 9) that the Board's order—requiring it to "furnish the Union its written job descriptions in advance of timestudies by the Union in connection with any grievances or in connection with the preparation for the negotiation of contract" (Pet. App. A167)—"requires the Company to rewrite a provision of its contract proposals" totally misconceives the basis for the Board's order. Petitioner has a statutory obligation to provide the Union with sufficient information for the intelligent discharge of its function as collective bargaining agent, and the order merely implements that obligation. See *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432.

business purpose for requiring a complete abrogation of vacation pay in addition to the proportional reduction already built into the system,"[8] particularly since the strike was caused by the employer's unfair labor practices (Pet. App. A10).[9]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1970.

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[8] Vacation pay was figured as a percentage of the wages earned (*supra*, p. 13).

[9] *Roegelein Provision Co.*, 181 NLRB No. 72, 73 LRRM 1396, March 6, 1970 (Pet. Supp. 2) is distinguishable. There the strike was not provoked by the employer's unfair labor practices, and the contract provision relating to loss of vacation benefits had recently been negotiated with specific knowledge by the union that it would apply to absences due to the then pending strike, no less than to other absences.

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